

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN PFANNENSTIEL)	
Claimant)	
VS.)	
)	
DODGE HOUSE RESTAURANT)	Docket No. 140,795
Respondent)	
AND)	
)	
DODSON INSURANCE COMPANY)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

ON the 18th day of November, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of the Order entered by Administrative Law Judge Thomas F. Richardson, on October 13, 1993, came regularly on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through his attorney, Lelyn J. Braun, of Topeka, Kansas. The respondent and insurance carrier appeared by and through their attorney, Terry J. Malone, of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Jeff K. Cooper, of Topeka, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Order of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Order of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What, if any, attorney's fees are appropriate under K.S.A. 44-536.
- (2) Is claimant entitled to a modification of his award regarding the nature and extent of claimant's disability pursuant to K.S.A. 44-528?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The Workers Compensation Appeals Board on review of an act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section 53(b)(1).
- (2) The original award in this matter was rendered on February 20, 1991, at which time claimant was awarded a 13 percent permanent partial general disability on a functional basis.
- (3) At the time of the original award the claimant was found to have suffered a personal injury by accident arising out of and in the course of his employment on January 24, 1988, to his low back.
- (4) Claimant was further found to have returned to work as the operator and manager of the Dodge House Restaurant, his then current employer, with the ability to perform the physical activities of said job within the restrictions issued by Dr. John H. McVicker, the treating physician. Claimant was awarded future medical treatment on application to the Director as part of the original award.
- (5) A preliminary hearing was held September 16, 1991, after claimant requested additional medical care under the original award. Subsequent to this preliminary hearing, claimant was referred to Dr. C. Reiff Brown in Great Bend, Kansas. The court ordered no additional temporary total unless and until claimant underwent surgery at which time temporary total would be proper.
- (6) Claimant underwent back surgery on February 14, 1992, and was paid temporary total benefits from that date until August 24, 1992, at which time Dr. David Kraker, the authorized treating physician, opined claimant had reached maximum medical improvement, provided him with a 40 percent functional impairment rating to the body as a whole and gave specific work restrictions from the functional capacity assessment ordered by Dr. Kraker.

(7) Claimant's attorney has requested additional attorney's fees above the statutory 25 percent allowed under K.S.A. 44-536, from the September 14, 1991, hearing.

(8) K.S.A. 44-536(g) states in part:

"If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney's fees shall be paid from such amounts of compensation."

(9) As claimant was paid temporary total benefits from February 14, 1992 to August 24, 1992, as a result of the hearing of September 14, 1991, the claimant's attorney's request for additional fees and expenses beyond that allowed by the Administrative Law Judge are herein denied.

(10) Subsequent to undergoing surgery by Dr. Kraker, claimant was transferred to the care of Dr. Marc Asher by agreement of the parties.

(11) On September 11, 1992, an application for review and modification was filed. The hearing regarding claimant's requested review and modification began October 19, 1992. Due to an ongoing dispute regarding appropriate medical care and the stipulation of medical records into evidence, the matter was continued until April 20, 1993. As a result of the order issued from the hearing of April 20, 1993, claimant's award was increased from 13 percent whole body functional impairment to a 77 percent permanent partial general disability.

(12) Claimant's attorney has also requested costs and attorney's fees above the statutory 25 percent allowed under K.S.A. 44-536, from the hearings of October 19, 1992, and April 20, 1993.

(13) The specific language from K.S.A. 44-536(g) will not be restated by this Appeals Board but it is clear that claimant received and award of additional compensation and any attorney's fees of the claimant's attorney shall be paid from such amounts of compensation. The Appeals Board, after reviewing the entire record, finds that the claimant's attorney's request for additional costs and fees is denied.

K.S.A. 44-536 is clear regarding the requirements of obtaining attorney's fees. If the attorney for the claimant wishes to accept a usual and customary rate of \$75.00 per hour and 28 cents per mile in lieu of the 25 percent share of additional compensation awarded, the Board is certain the claimant would be more than happy to accept the additional monies.

The Board further notes that the contract agreement between the claimant and the attorney for the claimant specifies a contingent fee arrangement of 25 percent of any benefits received under this matter as well as one-third of any such proceedings received if such matter is taken up on appeal. As K.S.A. 44-536 allows a maximum of 25 percent of any award as attorney's fees, the contract, to the extent it allows more than 25 percent of the award would be in contravention of K.S.A. 44-536, and would be void.

(14) The respondent and insurance carrier and the Kansas Workers Compensation Fund allege claimant has failed to offer admissible evidence relating to any change in the functional disability suffered and that claimant has failed to show a loss of access to the open labor market and a loss of ability to earn a comparable wage based upon evidence properly in the record. These allegations made by the respondent and Kansas Workers Compensation Fund stem from the contention that the medical records of Dr. David Kraker are inadmissible as medical heresay.

(15) The Appeals Board, while understanding the significance and the impact of K.S.A. 44-519 notes the offer of Dr. Kraker's medical reports into evidence during the deposition of Dr. Marc Asher resulted in no objection from any of the parties. It is also noteworthy that Dr. Asher, when asked on direct examination, concurred with the findings and functional impairment rating of Dr. Kraker. This testimony solicited no objection.

(16) K.S.A. 1992 Supp. 44-519 states:

"No report of any examination of any employee by a health care provider, as provided for in the workers compensation act and no certificate issued or given by the health care provider making such examination, shall be competent evidence in any proceeding for the determining or collection of compensation unless supported by the testimony of such health care provider, if this testimony is admissible, and shall not be competent evidence in any case where testimony of such health care provider is not admissible."

(17) K.S.A. 44-519 does not prohibit the admission of such evidence by stipulation of the parties.

(18) K.S.A. 1992 Supp. 44-519 does not limit the information a testifying physician or surgeon may consider in rendering his or her opinion as to the condition of an injured employee. Boeing Military Airplane Co. v. Enloe, 113 Kan. 128, 130, 764 P.2d 462 (1988).

(19) In Boeing the testifying doctors each relied in part upon reports of absent doctors in forming their opinions. Notably, the non-testifying doctor's reports were not placed into evidence in Boeing.

(20) In this case, Dr. Asher adopted the findings of Dr. Kraker as his own. The end result is that the increased award is based upon the medical opinion of Dr. Asher and upon the medical opinion of Dr. Kraker. The lack of objection to this medical testimony has resulted in a situation where objectionable medical evidence is admitted and becomes a legitimate basis for an increased award.

(21) Claimant was evaluated by Mr. Jerry D. Hardin on January 30, 1990, regarding claimant's loss of ability to perform work in the open labor market and to earn comparable wages. Mr. Hardin, in his evaluation of the claimant, based his opinion solely on the medical reports of Dr. David Kraker.

(22) The Kansas Workers Compensation Fund did timely object to Mr. Hardin's opinion as being based upon inadmissible evidence, i.e., the medical reports of Dr. Kraker.

(23) While under normal circumstances this objection would be well taken, unfortunately the medical records of Dr. Kraker, adopted by Dr. Asher as his own, have taken on a new life and were rendered admissible due to the lack of timely objection.

(24) The general rules of evidence are more liberally applied and less restricted in workers compensation matters. "The rules of evidence, K.S.A. 60-401 et seq., are not applicable in workers' compensation proceedings." Box v. Cessna Aircraft Co., 236 Kan. 237, 243, 689 P.2d 871 (1984).

(25) The Administrative Law Judge in considering Mr. Hardin's evaluation, and using the formula approved in Hughes v. Inland Container Corp., 247 Kan. 404, 799 P.2d 1011 (1990), awarded claimant a 77 percent permanent partial general disability.

(26) The Appeals Board having reviewed the whole evidentiary record filed herein, including all properly admitted evidence, and in addition to the stipulations of the parties, finds that the claimant suffered an increased injury and disability and pursuant to the Application for Review and Modification is entitled to a 77 percent permanent partial general disability computed from the filing of the application for review and modification on September 11, 1992.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the award of Administrative Law Judge Thomas F. Richardson, dated October 13, 1993, be affirmed in all respects and an award of compensation is hereby entered in favor of the claimant, Marvin Pfannenstiel, and against the respondent, Dodge House Restaurant, and the insurance carrier, Dodson Insurance Company, and the Kansas Workers Compensation Fund.

The claimant is entitled to 173.43 weeks of permanent partial disability at the rate of \$256.00 per week for a 77 percent permanent partial general disability making a total award of \$44,398.08. As of October 15, 1993, there would be due and owing to the claimant 57 weeks of permanent partial compensation at \$256.00 per week in the sum of \$14,592.00 which is ordered paid in one lump sum less amounts previously paid.

Thereafter, the remaining balance in the amount of \$29,806.08 shall be paid at \$256.00 per week for 116.43 weeks or until further order of the Director.

The Kansas Workers Compensation Fund, per the stipulation of the parties, is ordered to reimburse the respondent and insurance carrier an amount equal to 50 percent of all sums heretofore paid to or on behalf of the claimant, if not already reimbursed, and to pay 50 percent of the increase in the award.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier (50 percent) and the Kansas Workers Compensation Act (50 percent) to be paid direct as follows:

UNDERWOOD & SHANE

Transcript of Proceedings	\$ 78.90
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UNDERWOOD & SHANE

Transcript of Proceedings	\$ 141.95
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UNDERWOOD & SHANE

Transcript of Proceedings	\$ 186.35
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UNDERWOOD & SHANE

Transcript of Proceedings	\$ 141.95
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METROPOLITAN COURT REPORTERS, INC.

Deposition of Dr. Marc Asher	\$ 166.10
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DON K. SMITH & ASSOCIATES

Deposition of Jerry D. Hardin	\$ 248.75
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IT IS SO ORDERED.

Dated this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Lelyn J. Braun, 1324 Topeka Blvd., Topeka, Kansas 66612
Terrence J. Malone, P.O. Box 39, Dodge City, Kansas 67801
Jeff K. Cooper, Bank IV Tower, Topeka, Kansas 66603
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director